United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1321

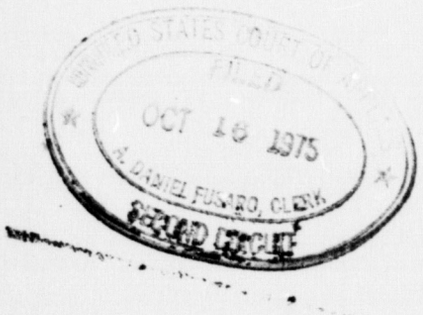
To be argued by:
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ADOLPHO RIVERA, Appellant.	Docket No. 75-1321

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ADOLPHO RIVERA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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QUESTION PRESENTED

Whether the District Court improperly denied defense counsel's request that appellant Rivera be evaluated pursuant to 18 U.S.C. §4208(b) prior to sentencing.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Inzer B. Wyatt) entered on August 29, 1975, sentencing appellant Rivera to a term of imprisonment of ten years, imposed pursuant to a conviction for aiding and abetting an armed assault.

This Court granted leave to appeal in forma pauperis, and continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On January 28, 1975, after a trial before a jury, appellant Rivera was convicted of aiding and abetting an assault with intent to rob mail matter, money or other property of the United States (Count Two) (18 U.S.C. §§2114, 2); of the commission of that act with the use of a dangerous weapon (Count Three) (18 U.S.C. §§2114, 2); of aiding and abetting an assault on a Federal officer (Count Four) (18 U.S.C. §§111, 2); and of aiding and abetting that assault with a deadly and dangerous weapon (18 U.S.C. §§111, 2) (Count Five).

On March 7, 1975, appellant was sentenced to a term of imprisonment of fifteen years for aiding and abetting an armed assault with intent to rob (18 U.S.C. §§2114, 2) (Count Three) and ten years for aiding and abetting an armed assault (18 U.S.C. §§111, 2) (Count Five), the terms to run concurrently. On appeal, this Court reversed the conviction for aiding and abetting an assault with intent to rob and armed assault with intent to rob (18 U.S.C. §§2114, 2).* Further, this Court remanded for re-sentence the convictions for assault and armed assault to insure that the sentences for these crimes were not improperly influenced by the convictions on those crimes which had been reversed. United States v. Rivera, Doc. No. 75-1109, slip op. 4769, 4775 (2d Cir., July 14, 1975).**

On August 29, 1975, Judge Wyatt re-sentenced appellant to a term of ten years' imprisonment for armed assault, the same sentence previously imposed.*** The Judge dismissed Counts Two and Three of the indictment (12****).

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*Counts Two and Three of the indictment charge aiding and abetting an assault with intent to rob and armed assault with intent to rob. The indictment is "B" to appellant's separate appendix.

**The opinion of the Court of Appeals is "C" to appellant's separate appendix.

***Judge Wyatt sentenced appellant only on Count Five, holding that Counts Four and Five of the indictment merged.

****Numerals in parentheses refer to pages of the minutes of the re-sentencing proceeding of August 29, 1975. The transcript of this proceeding is "D" to appellant's separate appendix.

At the sentencing proceedings, defense counsel requested that the District Court direct that appellant be evaluated under the provisions of 18 U.S.C. §4208(b) and postpone sentencing appellant until the results of the evaluation were known (4). Defense counsel stated that he made this request because the pre-sentence report furnished by the U.S. Probation Department for the Southern District of New York was extraordinarily meager. Further, counsel stated that although the report contained some evidence that appellant had been suffering severe psychological problems since 1971 (4),* no examination had been made to determine appellant's psychological health, "which [would give] some insight into the dynamics of [appellant's] personality and the possibility of any training or change" (4).**

The District Court denied the request for an evaluation pursuant to 18 U.S.C. §4208(b) because of "the nature of the offense" (5).

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*Defense counsel read into the record a portion of an evaluation of appellant done while appellant was in the Army in 1971. This evaluation was quoted in part in the pre-sentence investigation report prepared by the Department of Probation. The quoted portion reads: "Explosive personality. Chronic moderateness is manifested by frequent outbursts of hostility. Poor judgment especially under stress. Strong sensitivity to separation and abandonment and poor self-esteem" (4).

**Defense counsel also requested an evaluation pursuant to §4208(b) because of the nature of the facts involved in the crime (4).

ARGUMENT

THE DISTRICT COURT IMPROPERLY DENIED DEFENSE COUNSEL'S REQUEST THAT APPELLANT BE EVALUATED PURSUANT TO 18 U.S.C. §4208(b) PRIOR TO SENTENCING.

The cursory nature of appellant's pre-sentence report and the indication contained therein that appellant had severe and long-standing psychological problems prompted defense counsel to request that appellant be evaluated pursuant to the provisions of 18 U.S.C. §4208(b). This request that final sentencing be postponed was grounded on the necessity for further analysis of appellant's personality. With such information, the District Court could not only have reconsidered the sentence imposed, but could have recommended a specific type of institution or treatment for appellant. Further, the information made available to the corrections officials in such a report could have been used to instruct and advise on the programs appropriate to appellant's needs so that the most hopeful situation for rehabilitation could be provided.

Instead, Judge Wyatt simply denied the requested evaluation, based solely on "the nature of the offense" (5). The rationale for the rejection of appellant's request demonstrates that the District Judge imposed the sentence he did solely in consideration of the crime involved, without reference to appellant's personal qualities and characteristics,

including his psychiatric status and needs. This mechanical approach to sentencing has been rejected in favor of a more individualized and flexible one, United States v. Baker, 487 F.2d 360, 361, 363 (2d Cir. 1973); United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974); Woosley v. United States, 478 F.2d 139, 144 (8th Cir. en banc 1973); see also United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974), which includes consideration of the psychological health of the defendant. United States v. Stumpf, 476 F.2d 945 (4th Cir. 1973). This kind of approach is critically important in light of a genuine attempt by corrections facilities to meet the needs of those charged to their custody in an attempt to rehabilitate. See generally American Bar Association, PROJECT ON SENTENCING ALTERNATIVES AND PROCEDURES, §2.1, §5.5 (Approved Draft 1968).

The purpose of the study provided under §4208(b) is to provide information which will permit an individualized and sensitive sentencing process. In part, 18 U.S.C. §4208(b) provides:

> If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General ... for a study as described in subsection (c) hereof.

As this Court recently stated in United States v. Polisi, 514 F.2d 977, 979 (2d Cir. 1975):

> The most evident purpose of any psychiatric examination which might be conducted pur-

> suant to that section is to determine the rehabilitative treatment appropriate in light of the prisoner's general mental state.

Further, the legislative history of §4208(b) indicates that the evaluation pursuant to that section is designed to provide a more complete study of the accused than is normally available in the pre-sentence investigation report. U.S. Code and Admin. News, 3881, 3898 (1958); see also United States v. Behrens, 375 U.S. 162, 165 (1963).

> This observation and diagnosis would be extremely helpful to the court in making disposition in certain types of cases; particularly where a difficult medical, psychiatric, sex, or rehabilitative problem may be involved.
>
> Statement on Behalf of the Judicial Conference of the United States, U.S. Code and Admin. News, supra, at 3998.

Here, appellant's request for an evaluation and study was rejected even though the pre-sentence investigation report insufficiently analyzed appellant's psychological problems. The provisions for a §4208(b) study provided the sentencing judge with the mechanism to remedy these deficiencies.*

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*Probation officials have recognized:

> Our reports, in many instances, do not give the more subjective elements which help us to really know the defendant -- his attitudes, feelings, and emotional reactions. We need to know about his prejudices, fears, hostilities, social and moral values, likes and dislikes, and his relationships with people. A mere skeletal presentation of

The District Court's improper denial of a §4208(b) study requires that appellant's sentence be vacated, see United States v. Kaylor, 491 F.2d 1133, 1141 (2d Cir.), vacated on other grounds, 418 U.S. 909 (1974); Woosley v. United States, supra, 478 F.2d at 139; United States v. Wilson, 450 F.2d 495 (4th Cir. 1971), and remanded for an examination pursuant to 18 U.S.C. §4208(b).

(Footnote continued from the preceding page)

> cold facts without building around it these more or less subjective elements will not give the court a true, vivid, living picture of the defendant.
>
> Evjen, Some Guidelines in Preparing Presentence Reports, 37 F.R.D. 177, 179-180 (1964).

CONCLUSION

For the above-stated reasons, appellant's sentence must be vacated and his case remanded with instructions directing a study pursuant to 18 U.S.C. §4208(b).

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ADOLPHO RIVERA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

Certificate of Service

October 16, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Nathaniel Silbermann